UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

NOLAN ENTERPRISES, INC. D/B/A/
CENTERFOLD CLUB,

Respondent,

-and-

Case No. 09—CA--220677

BRANDI CAMPBELL, AN INDIVIDUAL,

Charging Party,

EXCEPTIONS OF RESPONDENT, NOLAN ENTERPRISES, INC.

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The Respondent, Nolan Enterprises, Inc. (d/b/a Centerfold Club) ("Nolan"), through its counsel Plunkett Cooney, and for its Exceptions to the decision of the Administrative Law Judge in the above captioned matter, relies on the attached brief and states as follows:

Exception 1

Nolan takes exception to the ALJ's finding that Campbell was an employee [ALJ Opinion, p 26] because, *inter alia*, the ALJ failed to properly analyze the relationship between Nolan and Campbell with the analysis required by this Board in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). ALJ Opinion, pp 18-26. Further, Nolan relies on its argument set forth below in relation to Exception 3 and in the attached brief to support this Exception.

Exception 2

Nolan takes exception to the ALJ's finding that Nolan terminated its relationship with Campbell and did so because she exercised rights under the NLRA [ALJ Opinion, pp 27-29] because (1) Campbell had already abandoned the relationship; and (2) Nolan's letter never reached Campbell. Further, Nolan relies on its argument set forth below in relation to Exception 3 and in the attached brief to support this Exception.

Exception 3

Nolan takes exception to the ALJ's finding that Nolan violated Section 8(a)(4) of the NLRA, and a derivative violation of Section 8(a)(1) [ALJ Opinion, p 29, lines 35-43] because, to do so, the ALJ had to rely on his erroneous rulings as explained in Exceptions 1

and 2, above. Further, Nolan asserts and relies on the arguments and law in the attached brief to support this Exception.

For all of the reasons above and in the attached brief, the Respondent asks the honorable National Labor Relations Board to reverse the Administrative Law Judge and dismiss the Complaint against it.

Respectfully submitted,

PLUNKETT COONEY

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Dated: August 21, 2019

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STATEMENT OF THE CASE

Ohio Laws at Issue:

Nolan Enterprises, Inc. ("Nolan" or "the club") has operated the Centerfold Club, a night club with adult entertainment, for more than 30 years. Tr, p 598.[1] Adult entertainment is a highly regulated business in Ohio and, in addition to liquor law regulations, the state law contains significant statutory and administrative code sections relating to the conduct of a "sexually oriented business." O.R.C. § 2907.40, *et seq*; O.A.C. § 4301:1-1-52 (colloquially referred to as "Rule 52"). These laws are important because they were violated by charging party, Brandi Campbell ("Campbell"), as will be explained below.

The Ohio law at issue provides in relevant part as follows:

> No [entertainer tenant] who regularly appears nude or seminude on the premises of a sexually oriented business . . . ***shall knowingly touch a patron . . . or the clothing of a patron*** . . . or allow a patron . . . to touch the [entertainer tenant] or [entertainer tenant's] clothing.

O.R.C. § 2907.40 (C)(2) (emphasis added). With respect to sanctions for prohibited conduct, the law provides that if the entertainer tenant touches a patron's genitals, pubic region or buttocks, it is considered a First Degree Misdemeanor. O.R.C. § 2907.40 (E). If the entertainer tenant touches ***any other part of a patron*** (i.e., non-sexual touching), it is considered a Fourth Degree Misdemeanor. *Id.* Thus, Ohio law prohibits ***all*** touching, not just touching of a sexual nature. It is important to emphasize this aspect of the law because

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[1] The transcript from the hearing before the Administrative Law Judge ("ALJ") will be cited as "Tr, p ___". The ALJ's opinion shall be cited as "ALJ, p ___" (and line___, when appropriate). Exhibits identified by number were introduced by the General Counsel and exhibits identified by letter were introduced by the Respondent.

it is, in the end, the reason why Nolan "would have" terminated the relationship it had with Campbell.[2]

The Ohio Administrative Code makes it illegal for the adult entertainment establishment to allow any illegal touching to occur on its premises. O.A.C. § 4301:1-1-52 (B). If Nolan permitted touching of patrons by its entertainers in violation of Rule 52, it could lose its liquor license. *See, e.g., Planet Earth Entertainment, Inc. v. Ohio Liquor Control Commission,* 125 Ohio App. 3d 619, 709 N.E.2d 220 (10th Dist. Franklin County, 1998). Thus, any touching is strictly prohibited by the club. Because it does not tolerate violations of the law on its premises, Nolan has never been cited for either liquor law-related or sexually-oriented business violations in its 30 years of operation. Tr, p 786.

Despite having been trained and instructed concerning the law, and warned after she initially violated it, Campbell was video taped again violating the law and, as a result, the club decided it should terminate its business relationship with her. Exs G 1,2,3,4. The ALJ, however, apparently felt that only touching of a "sexual" nature would justify the lawful termination of the relationship that Nolan had with Campbell and Nolan takes exception to his disregard of the clear language of the Ohio law. ALJ, p 29.

The Lease Relationship:

Campbell was never an employee of the club. She was a tenant. Campbell, like the other entertainer tenants, was specifically offered the option to be treated as an employee or to enter into an Entertainer Tenant Space Lease Agreement ("Lease Agreement"). Ex 2; Tr, pp 509, 532-33, 554-55. Part 1 of the Lease Agreement is the specific agreement to lease

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[2] Nolan says it "would have" terminated the relationship, rather than "did terminate" because, as explained *infra*, by the time it wrote a letter to Campbell to do this, she had already abandoned her relationship with the club and moved to another state.

space and disavows an employment relationship. Ex 2. Campbell clearly indicated she wanted to Lease Space and not be an employee and signed at the bottom of the page. Ex 2, Part 1.

Part 2 of the Lease Agreement is the actual agreement to lease space and provides nine pages of terms related to the lease. Ex 2, Part 2. Campbell signed Part 2 of the Lease Agreement as well. Ex 2, Part 2.

If Campbell (or any of the other entertainer tenants) had any confusion or uncertainty concerning the nature of their relationship with the club, Part 5 of the Lease Agreement describes and contrasts in detail, for two full pages, the differences between an entertainer tenant and an employee. Ex 2. Nolan has no interest in deceiving the entertainers. At the end of Part 5 of the Lease Agreement, Campbell again indicated her understanding and her desire to be an entertainer tenant, and not an employee, and to lease space from Nolan. Ex 2, Part 5.

The Lease Agreement provides the entertainer tenant with access to the club's premises to entertain and ply their trade as well as to earn money directly from club customers in exchange for paying Nolan certain usage or rental fees. Ex 2, Part 2. The entertainer tenants are considered neither employees nor independent contractors, **they are actually tenants**. However, consistent with an entrepreneur spirit, Campbell testified that it was her intention to be treated as an independent contractor and <u>not</u> an employee. Tr, p 436.

In the Lease Agreements, including the agreement signed by Campbell, Nolan spells out each of the following terms in detail:

1. Entertainer tenants are required to comply with Ohio law, including Rule 52 [the "no touching rule"], laws regarding opaque coverings

for nipples[3], and liquor laws and rules that are designed for health and safety purposes. Tr, pp 241, 211, 253.

2. Entertainer tenants are allowed to entertain and perform at as many establishments in addition to Nolan as they choose. Ex. 2. In fact, it is "not unusual" for entertainer tenants to entertain at multiple clubs at the same time. Tr, pp 616-17. Campbell did. Tr, pp 439-40.

3. Entertainer tenants are allowed to set their own space lease times or to have no space lease time at all, so long as they appear to entertain within the space they lease when they say they will. Tr, pp 510-11, 533, 555-56. Entertainer tenants can entertain and perform days, nights or both, as they are not required to pick a particular time of day or to have any type of set schedule. However, if they commit to entertaining for a certain day or night, then they are expected to do that. Tr, pp 448-49.

4. Entertainer tenants are allowed to choose their own music during their stage lease time from a list of 3,000 to 4,000 songs of the classic rock genre. Tr, pp 549, 568-69.

5. Entertainer tenants are allowed to choose their own costumes and footwear, within certain safety constraints (i.e., hard soled shoes because glass is served to patrons, Tr, p 253), within the adult entertainment theme and in compliance with state law.

6. Entertainer tenants earn and keep all gratuities with no control whatsoever by the club. They are neither required nor pressured to "tip out" to any employees of the club. Tr, p 204; Ex 2.

7. Entertainer tenants decide how many private dances (if any) they will perform for customers, who they will entertain or perform private dances for, how they entertain, when they entertain and even the amount to charge for each dance, so long as they meet "minimum" charge requirements for the club. Tr, pp 207-08. No matter how much the entertainer tenants charge customers for a private dance, they pay the club the same pre-set flat space usage fee for use of the private room. Tr, pp 515-16, 537-38, 558-59.

8. Entertainer tenants can earn additional money and receive a percentage on the sale of drinks to customers. However, they are not required to participate in selling drinks (or consume alcohol) at all. When entertainer tenants decide to participate, they cannot accept money directly

[3] Ohio law provides that the "nipple and areola" of an entertainer tenant must be covered with a "fully opaque covering." O.A.C. § 4301:1-1-52 (A)(2). To prevent violations, the club provides the nipple tape to the entertainer tenants and is included in their rental fee. Entertainer tenants may also buy their own fabric tape as long as it adheres to Ohio law.

from customers for drinks because that violates Ohio's liquor laws regarding solicitation. Therefore, the club collects the drink payments and, at the end of the night, pays the entertainer tenants their percentage of drink sales. Tr, pp 211-13.

9. During space lease times, entertainer tenants are requested to engage in a marketing process called "up time," during which they walk on stage and also circulate in the club to sell private dances or drinks in order to earn more fees or incentives. Tr, p 203.

10. During space lease times, entertainer tenants periodically entertain on the main stage. Once the entertainer tenants check in with the disc jockey, a rotation is created, so each entertainer tenant will know when it is her turn to perform her trade and entertain. Entertainer tenants can also request that they be "skipped" for a song or set. Tr, p 201. Rotations are put in place only so the entertainer tenants will know when to proceed to the stage, otherwise there would be "chaos." Tr, p 619.

11. Entertainer tenants are asked to use restroom facilities inside the club area that is controlled by club security for safety reasons. However, entertainer tenants may use customer restrooms that are located outside of the secured area of the club, but are asked to inform management or security so security can ensure their safety and protect them from potential sexual assault. Tr, pp 196-200.[4]

The above terms were agreed to by Campbell when she signed the Lease Agreement to be an entertainer tenant on February 24, 2018. Ex. 2. The Lease Agreement specifically allowed Campbell to become an employee, but she declined. Ex 2, Parts 1, 2 and 5; Tr, pp 509, 532-33, 554-55.

As per the lease, Campbell was not required or asked to lease space for any particular schedule dictated by anyone at the club. Instead, Nolan would text message her

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[4] Nolan could be held liable for harm suffered by an entertainer tenant should she be assaulted by a patron. *See, e.g., Womack v. Oasis Goodtime Emporium I, Inc.*, 307 Ga. App. 323, 329, 705 S.E.2d 199 (2010)(because there are "inherent dangers involved in selling alcohol in the presence of unclothed dancers..." establishments often use surveillance cameras, windows and bouncers to protect dancers in private entertainment rooms). A requirement, such as the one here, that is imposed by the company on independent contractors may be more about security and safety than to "control" the worker. *Fedex Home Delivery v. NLRB, 563 F.3d 492, 501 (D.C. Cir. 2009).*

to inquire daily whether she intended to rent space on that particular evening. Ex. A. In the end, Campbell leased space to entertain and performed at the club a total of only 14 times over a 7-week period before she abandoned the arrangement and moved to another state. Tr, p 444.

Campbell's Violations of Ohio Law:

Because of the importance of the "no touching" law to Nolan, Brenda Bonzo (then general manager) informed Campbell about the Ohio law after she signed the Lease Agreement. In fact, Bonzo *physically demonstrated* a legal dance for Campbell to ensure she understood. Tr, pp 612, 630.

Even General Counsel's witness, Jamie Stevenson, testified that Nolan enforced the no touching law and that she told Campbell "more than two times" that she could not touch customers during private room dances and was required to do "air dances." Tr, p 241. In the words of Stevenson, she told Campbell, "This is the law. Practice it." *Id.* In addition, ***all*** of Respondent's witnesses, including Bonzo, Louis Garcia (the private room monitor) and three entertainer tenants testified that, because touching of customers is illegal under Ohio law, no touching of patrons is allowed at the club. Tr, pp 513, 535-36, 557-58, 574-75, 612. Most importantly, Campbell testified at the hearing that she was well aware of Ohio law before she started dancing at the club and knew that "the law in Ohio is that you can't touch the customers." Tr, pp 426-27.

Despite this clear instruction and Campbell's knowledge of the law, in late February 2018, almost immediately after she signed the lease agreement, Campbell was observed illegally touching patrons during private dances. Tr, pp 584-87, 631; Ex B. One customer observed her kissing the neck of a patron and wanted to know why all the girls weren't

doing that (because he wanted that experience). Tr, pp 587, 634. Campbell was admonished by Garcia, the private room monitor, to stop touching customers. Campbell responded "You are not my boss and can't tell me what to do." Tr, pp 578-79; Ex B.

While it is true that Garcia was not Campbell's supervisor, because no employment relationship existed, Garcia knew that Nolan had to ensure that all entertainer tenants complied with the law because its liquor license was at risk. Thus, Garcia reported this interaction to his supervisor, Bonzo. As a result, Bonzo began monitoring Campbell's dances more closely because Campbell's response made clear she did not feel she needed to comply. Tr, pp 578-79; Exs G 1,2,3,4, video of Campbell's illegal dances. Thus, monitoring began in February before Campbell engaged in the alleged protected activity (or before Nolan became aware that she had done so in the past) because Campbell had resisted the directive that had been given to her. Tr, pp 631, 634.

Campbell Seeks to Safeguard the Landlord/Tenant Relationship:

On March 11, 2018, two weeks after she signed the lease agreement, Campbell delivered a list of concerns to Nolan. Ex 4. Notably, Campbell referred to herself 14 times as an independent contractor, and never once referred to herself as an employee. Ex 4. Campbell's overall concern in her memo was that she wanted to make sure she remained an independent contractor.

Nolan was caught completely off guard by Campbell's memo but promised to immediately investigate and address her concern. Tr, p 636. Greg Flaig, a consultant used by Nolan, reviewed her concerns and immediately resolved all of them except two because they involved safety issues. Nolan appreciated her raising the issues because it was

unaware that some of its employees may have been overstepping their authority and boundaries. Ex E, p 1.

Campbell's concerns and Nolan's written responses are as follows:

1. Being told by Ray to engage in "Up-time". As explained above, during space lease times, entertainer tenants are requested to engage in a marketing process called "up time," during which they walk on stage and also circulate in the club to sell private dances or drinks in order to earn more fees or incentives. Tr, p 203. This is for the entertainer tenants' benefit so that they can increase their earnings. To correct the matter, Nolan told Ray he should not be coaxing the entertainer tenants to do this. It is their decision.

2. Controlling the price of dances. Nolan explained that, while the DJ announces a minimum charge (sufficient for Nolan's fee to be paid and the entertainer tenants to make money), it is completely up to the entertainer tenant to set her own price. Nolan reiterated that no one at the club had any authority to tell her what she could earn as she is not an employee. Campbell just needed to advise the customer before the dance started on how much she would charge.

3. Being told not to put her feet up on the bar. Nolan informed Campbell that because food and drinks go on tables and on the bar and because of safety issues, she should not put her feet on it.

4. Being given orders by Courtney (bartender) concerning "mandatory" beverage orders and sitting with customers. Nolan informed Campbell that she is not required to sell drinks and that the "drink system" was put in place to allow the entertainer tenants to earn a percentage of the sales and to make more money. Nolan also denied that Courtney was ever given any authority over entertainer tenants and indicated she would be disciplined and instructed she was not to give any directives to the entertainer tenants again.

5. Being told she should not use the customer restroom (by the front door) without first asking permission. Nolan informed Campbell that this was a safety issue and to prevent the sale of drugs. However, if the entertainer restroom is busy, she should let management know and she could use the customer restroom.

6. Not being allowed to stand in the hall by the ATM. Nolan again informed Campbell that this is a safety issue since most of the fights have happened in that area and Nolan didn't want or allow a "bottleneck" or crowd in that area.

7. Leaving the club early on the nights she leases space. Nolan explained that she is free to pick any open lease times she wants and her responsibility is only for the time she asks to lease, no more, but no less. [Obviously the club has an interest in knowing if there will be entertainers present for the patrons and, more importantly, for providing fair lease opportunities for the other entertainers.]

8. Sitting in dressing room for as long as she wants. Nolan again explained that "up-time" is an hourly tool that allows the entertainers to "market" themselves for private dances, but she isn't required to participate.

Ex 4; Ex E. Thus, Campbell was not rejecting being classified as an independent contractor; ***she was asserting her rights as one*** in order to safeguard that relationship.

When Campbell signed the Lease Agreement, she chose to receive the "$100 guarantee." This is a small way of Nolan minimizing some of the risks inherent in the lease arrangement but, in order to receive the guarantee, entertainer tenants were expected to make reasonable efforts to earn that much by marketing themselves in various ways as explained above.

During the meeting, Campbell indicated she wanted to opt out of the guarantee. After addressing Campbell's concerns, Nolan advised in its memo to Campbell that "[w]hen we leased you space, Brenda gave you the option of a guarantee, which you took. Now that you are not on the guarantee, not doing uptimes, not following any of our business model, no one has any reason to intercede in your approach to your own entertainment approach, as long as it meets the criteria of your lease, state and federal laws and health and safety standards. ***You are free to earn as much or as little as you wish***..." Ex E. Clearly, Nolan took appropriate action to ensure that Campbell was not controlled by any of the club's employees in order to protect her status as an independent contractor as she had requested. Consistent with entrepreneurship, Campbell was free to market herself and earn more money, or not.

The written response by Nolan concluded by stating: "Thank you again for your feedback and thoughts and we look forward to you being a productive entertainer for yourself, your family and your future." Ex E. Indeed, Nolan was truly appreciative since it was unaware of many of the issues she raised and it needed to ensure that its employees (i.e., the bartender and DJ) were not attempting to improperly exercise any control over the entertainer tenants that could jeopardize the landlord/tenant relationship that had been established from the very beginning.

The written response was personally handed to Campbell in the office of the club following the meeting between Campbell and club management. Tr, pp 455-56, 640-41, 795-96; Ex E. Because Nolan took the issue of control seriously, it also immediately scheduled meetings with all employees and other entertainer tenants to ensure their status as tenants remained protected. Tr, pp 640-46. Campbell, however, was disinterested in discussing her concerns with the other entertainer tenants and failed to attend even a single meeting. Tr, p 458.

During the meetings held March 12 through March 17, 2018 with all of the entertainer tenants, none expressed any concerns similar to Campbell. Tr, pp 645-47. In fact, by the end of the meeting, Nolan had to instruct the entertainer tenants to take no action against Campbell because several had expressed anger with her. *Id.* Still, Nolan reinforced the appropriate policies and procedures related to entertainer tenants and their space leases to the entertainer tenants. *Id.*

Campbell's Efforts to Terminate the Relationship:

During the March 12, 2018 meeting with Campbell, attended by Flaig, Bonzo and former club owner Fred Tegtmeier (who is now deceased), Campbell continuously pressed

club leadership with variations of the question, "You are going to get rid of me, right?" Tr, pp 641-42.

When it became apparent that not only was Nolan not interested in terminating her lease for raising concerns, but that Nolan was actually taking her seriously and taking corrective action, Campbell changed her tactics. Campbell began sending vile and harassing text messages to Nolan's management team, calling them names like "exploitive piece of sh--," "pathetic liar" and "racist white supremacist bit--." Ex A. Campbell knew she needed to be discharged in order to assert a charge with the NLRB for retaliation and was doing her best to get fired because her memo had not accomplished the goal. When she failed in her attempts, Campbell literally abandoned her relationship with Nolan as explained below.

Campbell returned to the club *only two more times* after her issues were resolved (March 22 and April 3, 2018). Tr, p 467. Neither time did she conduct any follow up at all with Nolan regarding her previous concerns and she raised no further issues. Tr, pp 466-67, 644. Apparently, Campbell was satisfied that she was being treated as an independent contractor.

During her last two days at the club, Bonzo continued to monitor Campbell's private dances (as she had done prior to Campbell coming forward) because of her history of performing illegal dances and her apparent and outspoken disagreement with the rule that was being enforced. Tr, pp 578-79, 631-34. During both of her last two times at the club, the videotape showed that Campbell was still performing illegal private dances. Ex G 1,2,3,4. During her testimony, Campbell freely admitted that she touched patrons during those dances in violation of Ohio law and Nolan's strict prohibitions. Tr, p 828.

Because it was clear to Nolan that Campbell had no interest in complying with Ohio law, despite having been warned, Nolan, on April 7, 2018, prepared a letter to Campbell indicating that the lease was terminated and mailed it to the address on her lease. Ex 26. Campbell, however, testified that she never received the Nolan's April 7th letter because she had already moved to another state and abandoned her job at the club. Tr, pp 477-78. Campbell had begun leasing space at a nightclub in West Virginia on March 15 and moved from the Columbus Ohio area soon after the last day she leased space from Nolan on April 3, 2018. Tr, pp 439-40, 467.

Campbell had abandoned her tenancy relationship with Nolan sometime after the last day she leased space on April 3, 2018. Thus, the April 7 termination letter was unnecessary. It was also ineffective because the club couldn't terminate a lease that had already been abandoned by Campbell.

Procedural Background:

Campbell filed her complaint with Region 9 in May, 2018 and later amended it in August. Tr, pp 477-79. The case was tried on January 28-29, and February 13, 2019 before Administrative Law Judge Andrew S. Gollin.

Thus, the hearing in this matter occurred after this Board issued *SuperShuttle DFW, Inc.,* 367 NLRB No. 75 (2019), which overturned the test previously used to determine independent contractor status. The ALJ issued his decision on July 25, 2019, just a few months later.

While paying lip service to *SuperShuttle*, the ALJ simply ignored this Board's ruling and applied the previous test that it had overruled. As a result of his errors, the ALJ found that Campbell was a statutory employee. The ALJ also found that Nolan had discharged

Campbell because she engaged in statutorily protected Board activities in violation of Section 8(a)(4) of the Act and by doing so had a derivative violation of Section 8(a)(1).

Specifically, the ALJ, found that Nolan violated Section 8(a)(4) of the Act by terminating the Lease Agreement because Campbell had engaged in protected activities against prior employers and for threatening to go to the Board if Nolan did not give her a copy of the Lease Agreement she had signed. The ALJ found that such conduct could also discourage employees in the exercise of their Section 7 concerted rights (a derivative violation of Section 8(a)(1)).[5]

Respondent takes exception to the ALJ's decision for the reasons identified in its Exceptions.

QUESTIONS INVOLVED

(1) ***Given Campbell's significant entrepreneur opportunities and the required analysis set forth in this Board's 2019 SuperShuttle opinion, did the ALJ err in finding that Campbell was an employee and not a tenant (or independent contractor) when he applied the wrong analysis?***

As stated in Exception 1, Respondent submits that the ALJ did err and relies on its Exceptions and its arguments *infra*.

(2) ***Given that Campbell abandoned her relationship with the club, did the ALJ err in finding that the Respondent terminated the lease agreement and would not have done so had Campbell not exercised rights under the Act?***

As stated in Exception 2, Respondent submits that the ALJ did err and relies on its Exceptions and its arguments *infra*.

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[5] The ALJ did not reach the question of whether Campbell had engaged in protected activities when she submitted her memo of concerns or whether she was terminated for having done that. ALJ, p 29, n 26. Nor did he decide whether Campbell acted on behalf of other entertainer tenants at the club. This may be perhaps because he recognized that Campbell had actually asserted rights as an independent contractor, to ensure she maintained that status, and not as an employee.

(3) ***Given the exceptions taken by Respondent and the ALJ's errors, did the ALJ also err in finding that the Respondent violated Section 8(a)(4)(and a derivative violation of Section 8(a)(1)) of the NLRA?***

As stated in Exception 3, Respondent submits that the ALJ did err and relies on its Exceptions and its arguments *infra*.

SUMMARY OF ARGUMENT

As more fully explained below, Nolan has not violated the National Labor Relations Act ("NLRA" or "the Act") and the Complaint should be dismissed because the ALJ, while paying lip-service to this Board's decision in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019), failed to properly apply it's analysis to the facts in this case. Campbell was not an employee at any time during the seven-week period that she leased entertainment space at the club and she took steps to ensure that she retained significant entrepreneur opportunities and independence. Thus, Campbell did not exercise rights under the Act; instead she exercised rights that would ensure she was not entitled to the protections of the Act as to Nolan.[6]

Second, Campbell abandoned her Lease Agreement with Nolan. To the extent that Nolan would have made it mutual (due to her blatant violations of Ohio law that could have jeopardized its liquor license), its letter cancelling Campbell's Lease Agreement was (1) prepared after Campbell had already moved to another state and abandoned her tenant relationship with Nolan; and (2) never reached Campbell. Thus, Nolan did not terminate the relationship, Campbell did.

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[6] In fact, Campbell did not engage in concerted or protected activity under the Act when she asked for a copy of her Lease Agreement; she was exercising her rights as a tenant. Campbell never argued that she was an employee or that she should be treated as one for *any* purpose. Instead, Campbell sought to maintain her independent contractor (tenant) status.

It is for these reasons as more thoroughly explained below that the ALJ's decision should be reversed and the Complaint, which is totally without merit, should be dismissed.

ARGUMENT

Exceptions:

Exception 1. Nolan takes exception to the ALJ's finding that Campbell was an employee [ALJ Opinion, p 26] because, *inter alia*, the ALJ failed to properly analyze the relationship between Nolan and Campbell with the analysis required by this Board in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019). See analysis in ALJ Opinion, pp 18-26. Further, Nolan relies on its argument set forth below in relation to Exception 3 to support this Exception.

Exception 2. Nolan takes exception to the ALJ's finding that Nolan terminated its relationship with Campbell and did so because she exercised rights under the NLRA [ALJ Opinion, pp 27-29] because (1) Campbell had already abandoned the relationship; and (2) Nolan's letter never reached Campbell. Further, Nolan relies on its argument set forth below in relation to Exception 3 to support this Exception.

Exception 3. Nolan takes exception to the ALJ's finding that Nolan violated Section 8(a)(4) of the NLRA, and a derivative violation of Section 8(a)(1) [ALJ Opinion, p 29, lines 35-43] because, to do so, the ALJ had to rely on his erroneous rulings as explained in Exceptions 1 and 2, above. Further, Nolan asserts and relies on the arguments and law below to support this Exception.

Standard of Review:

"The Board is 'free to find facts and draw inferences different from those of the ALJ. *Jolliff v. NLRB*, 513 F.3d 600, 607 (6th Cir. 2008). But it cannot 'ignore relevant evid ence that detracts from its findings.' *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6th Cir. 2013)." *Intl. Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Nat'l Labor Relations Bd.*, 844 F.3d 590, 598 (6th Cir. 2016).

"Of course, the Board 'is free to substitute its judgment for the ALJ's,' *Local 702, Int'l B'hood of Elec. Workers, AFL-CIO v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000), but 'when the Board reverses an ALJ it 'must make clear the basis of its disagreement.'" *Traction Wholesale Ctr. Co., Inc. v. NLRB*, 216 F.3d 92, 101 (DC Cir. 2000).

A. AS AN ENTERTAINER TENANT, CAMPBELL WAS NOT AN EMPLOYEE.

As explained above, Campbell refused the opportunity to be an employee several times as she executed the Lease Agreement, including in Part 5 which explained in detail the differences between the two statuses. Ex 2. Approximately two weeks later, Campbell submitted a memo to ensure that her status as an independent contractor (tenant) was not jeopardized. Ex 4. Her status was then discussed with her during the meeting on March 12, 2018 and Nolan made appropriate changes to address her concerns and to safeguard the independent contractor relationship. Further, employees, including the bartender, who may have overstepped were disciplined for their actions. Ex E. At all times, Campbell was an independent contractor.

Nolan asserts that the ALJ failed to apply the correct test for determining employment status as stated by the majority (Chairman Ring, and Members Kaplan and Emanuel) in *SuperShuttle, supra*. In that case, this Board rejected the "economic realities

test" in favor of the well-established "common law" test and expressly overruled *FedEx Home Delivery,* 361 NLRB 610 (2014). In addition, this Board recognized that "[i]n the 50 years since the Supreme Court's decision in *United Insurance*, the Board and the courts have revisited and refined the proper application of the common-law factors to the independent-contractor analysis." *Id.* at 3. The ALJ, however, applied the common law factors as utilized 50 years ago, rather than those relied upon as refined somewhat over the decades and set forth by this Board in *SuperShuttle.*

For example, the ALJ's test included "kind of occupation" which is not a separate factor of the current Board's test. The ALJ also separated out "distinct occupation or business," "regular part of the business" and "the principal's business" into three separate factors (rather than one as this Board did in *SuperShuttle*) granting it a heightened quantitative value. ALJ, pp 22-25. The ALJ's test is that which was found in United Insurance, 50 years ago. Today's Board uses a refined test that Nolan shall apply and analyze in this brief.

Further, this Board cautioned that ***"[a]ll*** of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the ***total*** factual context is assessed in light of the pertinent common-law agency principles." *SuperShuttle,* at *2 (emphasis added).

The Board also emphasized that the application of the common law factors is not strictly quantitative but also a qualitative analysis that should be evaluated through the prism of entrepreneurial opportunity. *SuperShuttle*, at 15-16. "Thus, while all the considerations at common law remain in play, an important animating principle by which to evaluate those factors in cases where some factors cut one way and some the other is

whether the position presents the opportunities and risks inherent in entrepreneurialism." *Fedex Home Delivery,* 563 F.3d at 497.

In addition to not reviewing the factors as required by this Board, the ALJ seemed all too focused on a quantitative analysis (while paying lip service to the qualitative analysis) and failed to review each factor through the prism of entrepreneurial opportunity or as they apply to Campbell, herself.

In *SuperShuttle,* the Board determined that the at-issue drivers were independent contractors, not employees. Because the facts of this case are nearly identical to those in *SuperShuttle,* Campbell should have been considered an independent contractor for purposes of the Act.

Let's now review the facts in this matter under the correct factors as identified by this Board earlier this year.

i. The extent of control by the company.

It is important to note, as explained by the D.C. Circuit in *Fedex Home Delivery*, not all types of control creates an employment relationship:

> We have held that constraints imposed by customer demands and government regulations do not determine the employment relationship. ... '[W]here a company's control over an aspect of the workers' performance is motivated by a concern for customer service, that control does not suggest an employment relationship.' ... '[E]mployer efforts to monitor, evaluate, and improve the results of ends of the worker's performance do not make the worker an employee.'"

Id. at 501 (citations omitted).

Here, as explained above (and below), and as is evident from the Lease Agreement itself [Ex 2], Campbell could sign up to lease space, or not. She could lease space in the mornings or nights, or not. She could take as much time off as she wanted to, or not. She

could rent private room space for private dances, or not. She could sell private dances at higher than the minimum rate, or not. She could purchase new costumes, cosmetics, wigs, shoes, or not. She could get involved in selling drinks (for a percentage), or not. She could purchase erotic dance lessons or a gym membership to improve body image and movement, or not. She could spend time drinking with patrons while enjoying a cocktail herself, or not. She could perform and dance on the stage and receive tips for doing so, or not. She could participate in "up time" to market herself, or not. She could work at more than one club, or not. She could move to a different state with different laws pertaining to nude or partially nude dancer, or not. She could select her own songs, or not. She could incorporate new moves into her routines, or not. Or, as she apparently decided, she could incorporate ballerina moves into her dance, or not. Thus, the club exercised very little control over the entertainer tenants except as required by Ohio law and safety concerns. All of the choices above either made more profit for Campbell, or not. That is the very essence of entrepreneurship.

While the ALJ found the purchase of wigs, makeup, costumes, and shoes to be a significantly different risk than the purchase of the vehicle in *SuperShuttle* [ALJ p 24], "those distinctions, though not irrelevant, reflect differences in the type of service the contractors are providing rather than differences in the employment relationship." *Fedex Home Delivery,* 563 F.3d at 501. There is less financial risk here than in *SuperShuttle*, but there is also less profit involved. But that does not mean that there is not the same entrepreneur spirit involved. The same would be true of a child's lemonade stand. While the scale of economics is clearly different, the child has a true entrepreneur spirit. It is more about the nature of the industry, than employment status. What is important is not

the financial scale at issue, but the fact that Campbell had to make and investment and she retained the ability to maximize her profits, or not. That is entrepreneurship.

The facts of this case are virtually identical to those in *SuperShuttle* with respect to extent of employer control which, by agreement, Nolan could exercise. While this Board is intimately familiar with the facts in *SuperShuttle*, let's review the two sets of facts together. As stated by this Board in *SuperShuttle:*

> Franchisees set their own work schedules and select their own assignments; SuperShuttle does not set schedules or routes, nor does it require franchisees to be active during certain days or hours. Thus, franchisees have complete control over their schedules. All bidding and work assignments are handled through the Nextel system. . . . Generally, a franchisee incurs no negative consequences from passing on a trip. However, if the franchisee accepts a bid, he is required to complete the pickup or he may be subject to a $50 fine that is paid to the franchisee who completes the job.
>
> Although franchisees enjoy broad latitude in controlling their daily work, they are subject to certain requirements. The Airport Contract requires franchisees to wear a uniform and maintain certain grooming standards. Franchisees must display the SuperShuttle decals and markings on their vans, and they must maintain the interior condition of the vans, including the number of seats. DFW Airport has the right to inspect vans operated by SuperShuttle and to audit SuperShuttle's compliance with the Airport Contract. But these requirements are not evidence of SuperShuttle's control over the manner and means of doing business because they are imposed by the state-run DFW Airport.

Id. at *7, 18 (citations omitted). The same is true here.

Reviewing the Lease Agreement (and relevant testimony) it is clear that Campbell had the right to set her own lease time and even decide if she wanted to lease space to entertain on certain days, or not, and what hours she would request if she decided to lease space. Ex 2, p 3; Tr, pp 510-11, 533, 555-56. Even Campbell admitted that entertainer tenants can entertain and perform during the day, night or both and are not required adhere to any set lease space schedule. Tr, pp 448-49. Thus, she, like the drivers in

SuperShuttle, had complete control over her schedule. However, again like the drivers in *SuperShuttle*, if an entertainer tenant commits to leasing space on a particular date and time, they are expected to actually show up during that time, or the entertainer tenant could be fined for damages under the Lease Agreement, as agreed to by the entertainer tenant. Ex 2, p 3; Tr, pp 510-11, 533, 555-56.

In addition, like the drivers in *SuperShuttle* who had to abide by the airport's agreement with SuperShuttle, there are particular legal requirements imposed by the State of Ohio regarding the performances of the entertainer tenants. ***They cannot touch patrons, or allow patrons to touch them.*** O.R.C. § 2907.40 (C)(2). In the words of Stevenson, the General Counsel's witness, she specifically told Campbell she could only do "air dances." "This is the law. Practice it."

Unlike the drivers in *SuperShuttle* who had to wear a specific uniform approved by SuperShuttle, entertainer tenants, for the most part, were able to choose their costumes, clothing and footwear provided they complied with Ohio law which requires that they cover their nipples and areola with fabric material which is opaque. O.A.C. § 4301:1-1-52 (A)(2). Jamie Stevenson, the General Counsel's witness testified that "Nolan was making sure that the [entertainer tenants] were following the law" with respect to covering nipples. Tr, p 166. They are also asked to wear hard-soled shoes because drinks are served in glass containers which could break and puncture the bottom of soft-soled shoes which falls under safety concerns. Tr, p 253. While entertainer tenants were encouraged to wear shoes with heels (because they are performing artistic and "fantasy" dance), Campbell decided she wanted to wear ballerina shoes (and do ballerina routines). Nolan did not, at all, resist her decision to do so. Ex. E. However, given the risk to Campbell for cuts on her

feet from broken glass, the club requested she sign a release. Not only did the Lease Agreement permit Campbell and the other entertainer tenants to wear what they wanted to wear, it required Campbell (and the other entertainer tenants) to supply all of their own costumes and wearing apparel because they are independent contractors not employees. Ex 2, Part 1, ¶ 11, Part 2, ¶ 9.[7]

Similar to the drivers being able to determine which runs and where to bid on, entertainer tenants can choose how many dances (if any) they will perform for customers, who they will entertain, how they will entertain, and what songs to entertain and perform to within a genre of music offering literally thousands of choices. Tr, pp 515-16, 537-38, 549, 558-59, 568-69. Entertainer tenants are asked to perform on the main stage in a rotation because, without a rotation, it would be "chaos." Tr, p 619. But entertainer tenants may request to skip a rotation or be switched within the rotation, and such requests are routinely granted. Tr, p 201.

These requirements demonstrate no more control exercised over the entertainer tenants than the control which was exercised over the drivers in the *SuperShuttle* case. In that case, this Board found that any "controls" on the drivers "do not mitigate the substantial weight of the factors supporting independent-contractor status." *SuperShuttle,* at 18. The ALJ should have reached the same result here and Nolan takes exception in the ALJ's findings with regard to control and entrepreneurship.

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[7] The ALJ makes much about certain "unwritten" expectations for the entertainer tenants such as being required to remove their top while dancing on stage, not being permitted to go out into the seating area when dancing, being limited to classic rock or rock genre. However, Nolan, like FedEx, "has an interest in making sure her conduct reflects favorably on that logo" and to ensure safety. *Fedex Home Delivery,* 563 F.3d at 501. Nolan has built a brand over its 30 years of operations and, like FedEx, has a right to protect that brand without creating an employment relationship with the entertainer tenants, and especially Campbell who asserted her rights as an independent contractor.

ii. The method of payment.

In *SuperShuttle,* the drivers "pay a monthly flat fee pursuant to the [agreement], and their monthly fee does not vary based on revenues earned. They are entitled to all fares they collect from customers, and they do not share the fares in any way with SuperShuttle." *Id*, at 19. This Board emphasized that "when a driver pays a company a fixed rental and retains all fares he collects without accounting for those fares, there is a **strong inference** that the company does not exert control over the means and manner of his performance." *Id.* at 4 (emphasis added).

The same is true here. The uncontroverted testimony was that the entertainer tenant plays a flat fee of $14 per day/night. ALJ p 6, lines 25-28. The ALJ notes that of the $14, $2 is intended to cover the entertainer tenant's nipple tape for the day and $2 is intended to cover legal expenses. *Id*, lines 29-30. Nolan takes exception to the fact that the ALJ seems to take issue that the club failed to explain why legal fees were included in the rent, without offering any basis why the club is required to explain, at all, what parts of its overhead are covered by the rental payments. Regardless, the fact is that Campbell, like the drivers, paid a flat fee under the Lease Agreement and she retained all additional money received from the patron.

In addition, the Lease Agreement provides that the club will only set "minimum" charges for private dances and private room usage and rentals, but the entertainer tenants can charge whatever amount over the minimum they chose. Tr, pp 207-08, 515-16, 537-38, 558-59; Ex 2, Part 2, ¶ 7.[8] Thus, the more the entertainer tenant markets herself, and the

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[8] General Counsel's witnesses testified on the topic of minimum charges for dances and stated that they "*did not know*" if entertainer tenants could charge in excess of the minimum charges set by the club or not. Tr, pp 209-10. Respondent's witnesses testified that entertainer

greater her level of skill to create fantasy in her dance, the more she can make. Also, the entertainer tenants paid a flat rental fee to the club for the private room, regardless of the amount she charges to the customer for the dance. *Id.* This is exactly what would be expected of entrepreneurship. Nolan takes exception to the ALJ's finding that this somehow contributes to the finding of an employment relationship, while at the same time acknowledging that "[t]he more dances a dancer performs the more money she makes..."ALJ p 25, lines 3-4, 14, 15. In addition, like the drivers in *SuperShuttle*, the entertainer tenants keep all gratuities received from customers and are not required to share their tips (or report them to the club). Tr, p 204; Ex 2, Part 2, ¶ 5; ALJ p 7, line 49-50.

In finding this factor tipped in favor of an employment relationship, the ALJ relies on Part 13 which requires the entertainer tenant to pay fees to those who assist her and states that she will do so voluntarily or she is "free not to lease space here if [she is] unwilling to [do so]". ALJ p 7, lines 29-32. Nolan takes exception that the ALJ failed to further quote Part 13 of the Lease Agreement which continues by stating "At no time does The Centerfold Club demand I pay 'assistance fee's,' ***as it is an individual choice for me to use the assistance or not.***" Ex 2, Part 13 (emphasis added). For the ALJ to disregard and fail to quote this very important language is unfortunate and causes an inaccurate depiction of the Lease Agreement and the nature of the relationship. Clearly, the Lease Agreement provides that if an assistant's services are used, she is expected to pay for the service, but if she decides to not use the services, she is not.

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tenants could charge any amount they wished for private dances over and above the pre-set minimums. Tr, pp 515-16, 537-38, 558-59.

Also, the entertainer tenants can receive a set percentage of their drink sales to customers. The fact that Nolan provides the entertainer tenants with the ability to earn more money does not make the entertainer tenant an employee. *Fedex Home Delivery*, 563 F.3d at 502 ("Likewise, 'an incentive system...is fully consistent with an independent contractor relationship"). Notably, the entertainer tenants are not required to sell any drinks at all. Tr, pp 515-16, 537-38, 558-59.[9] Again, consistent with entrepreneurship, the more time during her lease the entertainer tenant decides to invest in selling drinks or with a particular client, the more money she can make; and the less time, the less she will earn. Significantly, Campbell, whose status is at issue, chose to opt out of drink sales and having drinks with patrons. Ex. E. Again, this is entrepreneurship. Campbell controlled the amount she would earn by engaging in activities, or not.

Nolan allows entertainer tenants to sign up for a guaranteed minimum $100/shift profit. But if they want the guarantee they are expected to market themselves and put forth an effort to sell private dances as an entrepreneur would. If they don't want the guarantee, which Campbell decided to opt out of following her meeting with Nolan, then they can just sit on a bar stool and not earn any money, at all. Ex E. Thus, the entertainer tenants have significant opportunities to make as much, or as little, as they want.

Note that the D.C. Circuit recognized that "a contractual willingness to share a small part of the risk – for instance, ... by guaranteeing a certain minimum amount of income for making a vehicle available [or for guaranteeing the entertainer tenant would earn not less than $100 a night, even if the club was slow] – does not an employee make." *Fedex Home*

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[9] The entertainer tenants could not collect drink fees directly from customers because Ohio liquor law prohibits such a practice as "solicitation". Instead, the entertainer tenant's sales are tracked and she is paid at the end of the night. O.R.C. § 4301.21; Tr, p 211.

Delivery, 563 F.3d at 502. Thus, the ALJ erred when he found that this minimum guarantee weighed heavily in favor of employment status. Not only was the ALJ's finding clearly wrong, he gave it heightened emphasis, compounding his error. Moreover, Campbell, whose status is at issue, opted out of the guarantee and therefore should not have been considered when determining her status.

Thus, the method of payment here also weighs heavily in favor of independent contractor status for Campbell and the other entertainer tenants. Nolan takes exception to the ALJ's finding that the method of payment weighs in favor of employment status.

iii. Instrumentalities, tools, and place of work.

The ALJ found the evidence on this factor to tip in favor of employment and Nolan takes exception to his finding. ALJ p 24, lines 6-20. The entertainer tenants provide all of the instrumentalities of their profession (wigs, costumes, makeup, shoes, skill, attractive and physically fit bodies, etc.) and, like the drivers in *SuperShuttle,* this permits them to entertain and perform whenever and wherever they choose. *SuperShuttle* at 19. The ALJ focused on the *place, this club,* the entertainer tenant decided to lease to ply her trade and did not take into consideration that the entertainer tenant could be leasing space at other clubs at the same time.

Moreover, by analogy, the flea market building where an artist rents space to display her goods is not the instrumentality of her craft. It is only the place where she rents space, which can be changed at the whim of the artist. The drivers in *SuperShuttle* were required to wait at the airport or the hotel but this Board found them to be independent contractors despite the limitations on where they worked. Here too, the club is just a place to rent and a place that Campbell decided to use to sell herself and ply her trade, but she

also did so at other clubs at the same time. This is not unusual for the industry. Tr, pp 616-17.

The ALJ also focused on the investment made by the entertainer tenants. As explained above, there may be less of an initial investment by the entertainer tenants than the *SuperShuttle* drivers, but the amount of potential earnings is less as well. It is simply a matter of scale due to the differences between industries. But the risk and potential profit is still there to support the entrepreneurial opportunity.

The ALJ again relied on the club's $100 guarantee that an entertainer tenant can agree to, but Campbell opted out and, even if she hadn't, as explained above, the D.C. Circuit recognized that "a contractual willingness to share a small part of the risk – for instance, ... by guaranteeing a certain minimum amount of income for making a vehicle available [or for guaranteeing the entertainer tenant would earn not less than $100 a night, even if the club was slow] – does not an employee make." *Fedex Home Delivery*, 563 F.3d at 502. Thus, this factor should weigh in favor of independent contractor status and Nolan takes exception to the ALJ's findings on this factor.

iv. Supervision.

In *SuperShuttle*, drivers were required to maintain communication with the company for daily scheduling and acceptance of ride bids. *SuperShuttle*, at 19. Again, if the drivers accepted a ride bid through the system and did not perform the ride, the drivers were subject to a fine. This Board found that the "isolated fines do not diminish" the drivers' "autonomy" or independent contractor status.

The same is true with the entertainer tenants here. They are free to lease space or not, lease space at any particular date or time and are not required to commit to a date or

time to lease space more than a day in advance. Tr, pp 510-11, 533, 555-56. If, however, the entertainer tenant commits to lease space during a particular time on a particular day, but then does not appear or does not entertain the entire time period, the entertainer tenant, like the drivers in *SuperShuttle*, could be subject to a fine. *Id.* The club holds space for that entertainer tenant just like a hotel holds space for a traveler once it is reserved.

The entertainer tenants are free to accept or not accept drinks from customers and to perform or not perform private dances for customers. Tr, pp 515-16, 537-38, 558-59. They are free to wear what they want, within the bounds of Ohio law. Tr, p 253. However, just as in *SuperShuttle,* they need to communicate with the club regarding leasing space and the order of stage appearances during leased time for the purposes of allowing the club to conduct an orderly business. This Board may be able to imagine the chaos that would result if the drivers in *SuperShuttle* did not have to respond to calls over the Nextel dispatching system or bid on runs. Ten drivers could show up for a passenger, or none. Thus, the minimal overlay of leasing space during a particular time and an order for peforming on the stage does not diminish the entertainer tenants' status as independent contractors. The entertainer tenants, like the drivers in *SuperShuttle,* have little supervision in *how* they do their actual job (artistic and fantasy dance), and Nolan takes exception to the ALJ's finding. This factor tips in favor of an independent contractor status.

v. The relationship the parties believed they created.

"[A] party's intent with regard to the nature of the relationship created ***weighs strongly*** in favor of finding independent contractor status." *Fedex Home Delivery*, 563 F.3d at 499, n 4 (emphasis added). In *SuperShuttle,* the shuttle service and the drivers executed a franchise agreement which expressly stated that drivers were not employees.

SuperShuttle, at 20. In addition, the shuttle service "does not provide franchisees with any benefits, sick leave, vacation time or holiday pay [nor does it] withhold taxes or make payroll deductions...." *Id.* This Board held that these factors support the finding of independent contractor status.

The same is true here. Campbell, like all entertainer tenants, was given the opportunity to choose whether to become an employee or to lease space as an entertainer tenant at the club. Ex. 2. Campbell specifically chose to NOT be an employee of the club and signed extensive documentation in which she repeatedly acknowledged that she was not, *and did not wish to be,* an employee, (including Part 5 of the Lease Agreement which spells out in detail the differences between the two statuses). *Id.* In fact, Campbell testified that she is intimately familiar with the legal distinction between employees and independent contractors, and frequently advises others on the differences. Tr, pp 434-36.

When asked about signing the Lease Agreement with Nolan, she admitted that her "intention was to sign up as an independent contractor." Tr, p 436. Moreover, approximately two weeks later, Campbell submitted a memo to Nolan to ***ensure that her status as an independent contractor (tenant) was not jeopardized.*** Ex. 4. In that memo, Campbell referred to herself no fewer than 14 times as an independent contractor. Campbell's status was then discussed with her during the meeting on March 12, 2018 and Nolan made changes to address her concerns and to safeguard her status as an independent contractor. In fact, employees, including the bartender, who may have overstepped by providing some direction to entertainer tenants, were disciplined for their actions. Ex. E.

Also, as in *SuperShuttle,* it is undisputed that the club did not withhold taxes or other payroll deductions, and did not provide Campbell or other entertainer tenants any benefits, vacation time or holiday pay. *See generally*, Ex 2. *See also* Ex 2, Part 2 ¶ 8, Part 3, and Part 5. "While unrelated to entrepreneurialism, this goes to party intent." *Fedex Home Delivery,* 563 F.3d at 499, n 4. Significantly, entertainer tenants were also required to obtain their own worker's disability compensation insurance coverage. Ex 2, Parts 4 and 5.

In addition, entertainer tenants were free to entertain and perform at Nolan and also at other clubs and it is "not unusual" for entertainer tenants to entertain and perform at multiple clubs at the same time. Tr, pp 616-17. Campbell did. Tr., pp 458, 442-43. The Lease Agreement specifically permitted it. Ex. 2, Part 1, ¶ 10; Part 5, ¶ 11.

This factor weighs ***strongly*** in favor of independent contractor status. While the ALJ also found this factor to weigh in favor of independent contractor status, he did not give it the weight required by the DC Circuit. *Fedex Home Delivery*, 563 F.3d at 499, n 4 ("[A] party's intent with regard to the nature of the relationship created ***weighs strongly*** in favor of finding independent contractor status.")(emphasis added). In fact, given that Campbell did everything she could to firmly establish an independent contractor relationship with Nolan before going to the Board to then attempt to claim rights afforded only to employees, Nolan asserts that Campbell should be estopped from claiming the status of an employee.

vi. Engagement in a distinct business; work as part of the employer's regular business; the principal's business.

In Exception 1, Nolan takes exception to the fact that the ALJ failed to properly analyze the relationship as required by this Board in *SuperShuttle* which recognizes that these three factors are closely related, and should be analyzed as one. *Id.* at 20. The ALJ's

analysis with regards to this factor is a clear example of why it is incorrect. The ALJ broke this one factor into three separate parts [ALJ, pp 22-23, 25, 26], thus tripling the quantitative impact of this singular factor.

To address all of the ALJ's erroneous findings, Nolan reviews each part of this factor separately as the ALJ incorrectly did in his opinion. However, as explained below, it is one factor and it weighs in favor of independent contractor status.

ALJ, pp 22-23, "Distinct occupation or business" - The ALJ indicates, *inter alia,* that the entertainer tenants rely on the club to earn a livelihood, and while they are allowed (and some do) lease space at other clubs, they would be equally reliant on that other clubs in the same way. This misses the point.

The same is true for a female artist who rents space at a flea market. She is a tenant who can rent space at as many flea markets as she chooses, and she will remain reliant on the flea markets to display her wares. But she does not become part of the flea market's business by renting that space and is not an employee even though the flea market needs artists and vendors to bring in customers. She is free to advertise, but likely does not, relying instead on the quality of her wares as displayed at the flea market to make money.

Nolan is in the bar/tavern business. The fact that it has entertainer tenants who entertain doesn't convert its business to something different, any more than would having another type of entertainment such as live bands. The live bands are not employees of the bar. The entertainment merely describes the type of bar/tavern it is and determines the

type of patronage, but it is still a bar/tavern. If Nolan stopped having entertainer tenants, it would still be a bar/tavern and would still have a liquor license and serve food. [10]

The entertainer tenants are just that – performers and entertainers. They are not a bar or tavern or even necessary to Nolan's existence. They are entertainer tenants, like bands, who can take their talent and trade any place they want. Campbell wanted to do ballet at the club. Ex E. She has the ability to do ballet or semi-nude dancing wherever she wants. It is her portable trade and it is highly portable. Tr, pp 616-17. Campbell, whose status is at issue, frequently changed locations and often worked at more than one business at a time.

Finally, the Lease Agreement reserves the right to the entertainer tenants to advertise or engage in promotional marketing. Whether Campbell (or any other entertainer tenant) chose to do so, they reserved that right by the Lease Agreement. Ex 2. Most entertainer tenants took advantage of this at the club itself. That is what "up time" was about. Campbell decided not to. Others did. This is entrepreneurship.

ALJ, pp 23, "Kind of Occupation" - The ALJ muddles this by reviewing the amount of supervision and whether there is discipline, the skill required, and then concludes it is not a specialty occupation and therefore customarily in the employer/employee context. Supervision and skill are already separate factors. Moreover, "kind of occupation" should not have been treated as a separate factor under the *SuperShuttle* analysis and should not

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[10] Only approximately 20% of Nolan's gross income is related to the usage or rental fees paid by the entertainer tenants to the club. Tr, pp 704-05, 788-89. The remaining 80% of gross income is related to the sale of food, alcohol, cigarettes, and snacks, or billiards and customer cover/door charges. *Id.*

have been further muddled by focusing on the supervision and skills factors. The ALJ's entire analysis is flawed and Nolan takes exception.

The proper question is whether this is the kind of occupation performed by individuals who are in business themselves. Because, as the ALJ admits, there was no evidence submitted on this factor, he should not have reached a conclusion for or against employment status. However, Nolan would argue that, as to performing and entertaining as an occupation, some entertainer tenants are independent contractors and some work as employees. Because it is Campbell's status that is at issue and because she consistently argued to preserve her independent contractor status, and Nolan consistently ensured that it was maintained, Nolan asserts that this factor should weigh in favor of that.

ALJ, p 25, "Regular Part of the Business" - Nolan again takes exception to the ALJ analyzing this issue as a separate factor when it is virtually the same as "distinct occupation or business" *supra*, and counting it as yet another factor in favor of an employment relationship. Nolan refers this Board to its arguments above concerning "distinct occupation or business" and asserts that entertainment is part of Nolan's current business model; however its primary business is as a bar/tavern.

Overall, the three parts of this one factor cut in favor of independent contractor status.

vii. Length of employment.

This Board has recognized that where a contract term is for a maximum of one year, and not for a longer term, the "factor favor[s] independent contractor status." *SuperShuttle,* at 20. In *SuperShuttle,* however, the evidence demonstrated that most drivers renewed their contracts yearly and therefore this factor was determined to be "neutral". *Id.*

Nolan takes exception to the ALJ's finding that "[t]he lease is for one year and automatically renews unless it is terminated." ALJ, p 6, line 10. In fact, Part 2 of the Lease Agreement, ¶ 2, actually states "[t]his Lease is for an initial term of **one (1) day** from today's date, and shall automatically renew every day for a period of up to one (1) year..." (emphasis added). While the Lease Agreement would be renewed unless the entertainer tenant cancelled it, ***the agreement was terminable without cause.*** Ex 2, pp 2, 6.

Unlike the evidence in *SuperShuttle*, there is no evidence in the record here that "most" entertainer tenants renew their leases yearly. The ALJ relies on the tenure of just three witnesses (from 1.5 to 4 years) and testimony that another entertainer tenant has "come and gone" over the course of 20 years to find this factor cutting in favor of employment. ALJ, p 24. In other words, that entertainer tenant has left her tenancy with the club many times. She may have been there for only a matter of a few days or weeks and then gone for several years. The record does not say. This does not make her a "20 year" entertainer tenant at the club as the ALJ seems to suggest.

Moreover, the ALJ apparently ignores that which he freely acknowledged - that there are entertainer tenants who leave before the end of the year. Indeed, the club often has 10 or more entertainer tenants open up on two stages at night but not more than 15 or 16 at a time performing. Tr, pp 600, 606-607. Thus, there have been many, many entertainer tenants over the years and the ALJ should not have based his determination on the tenure of just three witnesses.

More importantly, focusing on Campbell, whose status is at issue, she not only did not renew her lease, she entertained at the club only 14 times over a 7-week period before

she moved to another state and abandoned the relationship. Tr, p 444. Thus, as to Campbell, this factor weighs in favor of independent contractor status.

viii. Skills required.

The ALJ found that "limited skill" was necessary to be an entertainer tendant and therefore this factor favored employment status. ALJ p 23, lines 38-50. With due respect, Nolan takes exception because this simply isn't true. It requires more than being able to walk in high heals to be a successful performer and entertainer.

It may be true, as the General Counsel's sole witness testified, that entertainer tenants have not been rejected at their audition due to their dancing skill. Tr, p 101. However, that may simply mean that those who had the confidence in their ability to audition had the skills required.

More importantly, this Board has the authority to take judicial notice of common knowledge: not everyone has dance pole, sales, and stamina skills and abilities and can dance too...and even fewer can make their performance moves erotic. *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 579 (6th Cir. 2012); *Nabors v. NLRB*, 323 F.2d 686, 692 (5th Cir. 1963) (the NLRB is empowered to take judicial notice).

It is precisely because of the entertainer tenant's skill and talent that she has the ability to market her trade and sell her time wherever, whenever and however she wants, providing the entertainer tenant with significant entrepreneur opportunities.

Summary of *SuperShuttle* Factors:

Clearly, the same entrepreneurial autonomy that this Board recognized as to the drivers in the *SuperShuttle* case is present with the entertainer tenants in this case. The

factors, as explained above, weigh *heavily* in favor of independent contractor status or, here, entertainer tenants. As such, Campbell had no rights to assert under the Act.

B. CAMPBELL, NOT NOLAN, TERMINATED THE RELATIONSHIP WHEN SHE ABANDONED THE CLUB AND MOVED TO ANOTHER STATE.

As stated in Exception 2, Nolan takes exception to the ALJ's finding that Nolan terminated its relationship with Campbell and did so because she exercised rights under the NLRA [ALJ Opinion, pp 27-29]. It was Campbell who terminated the relationship, not Nolan, and to the extent it would have made the decision mutual, Nolan had lawful reasons for doing so.

As explained above, the Lease Agreement did not require Campbell to lease space for any particular amount of lease space times or any number of days per week. In the end, Campbell leased space to entertain and performed at the club a total of only 14 times over a 7-week period before she abandoned the arrangement and moved to another state. Tr, pp 444, 477-78.

It is clear that it was Campbell's intent to end the relationship. In fact, during the March 12, 2018 meeting with Campbell (attended by Flaig, Bonzo, and former club owner Fred Tegtmeier who is now deceased), Campbell continuously pressed club leadership with variations of the question, "You are going to get rid of me, right?" Tr, pp 641-42.

However, when it eventually became clear to Campbell that, not only was Nolan disinterested in terminating her Lease Agreement for making complaints but it was actually taking the appropriate action requested by Campbell to ensure the landlord/tenant relationship was not jeopardized, she changed her tactics. Campbell began sending vile and harassing text messages to Nolan's management team, calling them names

like "exploitive piece of sh--," "pathetic liar" and "racist white supremacist bit--." Ex A; ALJ p 13, lines 19-24. It's clear that Campbell was attempting to force Nolan to terminate the relationship so she could assert a retaliation claim with the NLRB. After Campbell gave it her best shot, but failed in her attempts, Campbell literally abandoned her Lease Agreement with Nolan.

Campbell performed at the club only two more times after Nolan took appropriate action to resolve the issues she raised (March 22 and April 3, 2018). Tr, p 467. On March 15, before submitting her concerns to Nolan, Campbell began leasing space at a nightclub in West Virginia and sometime after the last day she leased space on April 3, 2018, she apparently packed up and moved from the Columbus Ohio area to West Virginia. Tr, pp 439-40, 467. Thus, Campbell abandoned her relationship with Nolan and she, not Nolan, terminated it, which was her right to do.

Moreover, even if Campbell had not terminated the relationship when she abandoned the Lease Agreement and moved to another state, which she did, Nolan had lawful reasons for terminating the Lease Agreement. As explained above, Campbell violated Ohio law which provides in relevant part as follows:

> No [entertainer tenant] who regularly appears nude or seminude on the premises of a sexually oriented business . . . ***shall knowingly touch a patron . . . or the clothing of a patron*** . . . or allow the patron . . . to touch the [entertainer tenant] or [entertainer tenant's] clothing.

O.R.C. § 2907.40 (C)(2) (emphasis added). If the entertainer tenant touches a patron's genitals, pubic region or buttocks, it is considered a First Degree Misdemeanor. O.R.C. § 2907.40 (E). If the entertainer tenant **touches *any other part of a patron* (i.e., non-sexual touching), it is considered a Fourth Degree Misdemeanor**. *Id.* Clearly, Ohio law prohibits ***all*** touching, not just touching of a sexual nature.

The ALJ correctly found that the March 22, 2018 video in fact showed Campbell had touched two patrons while performing private dances. ALJ, p 28, lines 8-9. Thus, he found that she had violated Ohio law. The Ohio Administrative Code makes it illegal for the adult entertainment establishment to allow any illegal touching to occur on its premises. O.A.C. § 4301:1-1-52 (B). If Nolan permitted touching of patrons by its entertainer tenants in violation of Rule 52, it could lose its liquor license. *See, e.g., Planet Earth Entertainment, Inc. v. Ohio Liquor Control Commission,* 125 Ohio App. 3d 619, 709 N.E.2d 220 (10th Dist. Franklin County, 1998).

Despite having been trained concerning the law, and warned after she initially violated it, she continued to do so. Thus, Nolan began to monitor her private room performances, and Campbell was videotaped, once again, violating the law on March 22. Because Campbell clearly had no interest in complying with Ohio law, despite having a private room performance demonstrated to her previously *and warned*, Nolan, on April 7, 2018, after Campbell had already abandoned the relationship, prepared a letter to her indicating that the Lease Agreement was terminated. Nolan mailed the letter to the address on her lease; however Campbell *never received it because she had already left the state.* Ex 26; Tr, pp 477-78. Thus, the April 7th termination letter was unnecessary and ineffective because Nolan couldn't terminate a Lease Agreement that the tenant had already abandoned.

Nolan did not terminate the relationship, Campbell did. The ALJ thus erred in his finding that Nolan discharged Campbell.

Assuming, *arguendo*, that Nolan had terminated the relationship, rather than Campbell doing so, it clearly had lawful reasons for doing so and it is difficult to imagine a

more compelling reason than protecting its liquor license. The ALJ, however, apparently felt that only touching of a "sexual" nature would justify a lawful termination of the relationship and Nolan takes exception to his disregard of the Ohio law. ALJ, p 29.

Moreover, the ALJ found Nolan's April 7th letter to be pretexual and the real reason to be unlawful retaliation. Let's review his flawed reasoning.

First the ALJ found the timing of the April 7th letter to be suspicious because Nolan failed to prepare it immediately after the March 22 illegal private room performances. ALJ, p 28, lines 8-10.[11] However, the private room performances were video-taped, then reviewed, then given to Flaig (the consultant), then reviewed by attorneys to ensure the club was making a proper decision. Tr, pp 671-72. So, some delay should be expected.

In addition, the ALJ found that Nolan failed to establish that other entertainer tenants were discharged because of unlawful touching. ALJ, p 28, lines 21-35. An unlawful motive may be established by showing departure from past practice or disparate treatment. *See JAMCO,* 294 NLRB 896, 905 (1989), *affd. mem.* 927 F.2d 614 (11th Cir. 1991), *cert. denied,* 502 U.S. 814 (1991*); Naomi Knitting Plant,* 328 NLRB 1279, 1283 (1999). With due respect, it was the General Counsel's burden of proof to show discrimination or disparate treatment, not Nolan's burden to prove it did not occur and Nolan takes exception to the ALJ transferring the burden of proof to it.

Moreover, the ALJ made his finding based on the fact that General Counsel's witness (Stevenson) was unable to "verify" that others had been discharged for the same reason

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[11] The ALJ also noted that the letter was prepared by Nolan only after Campbell threatened to go to the NLRB if it did not give her a copy of her Lease Agreement. This would be a hollow threat since the NLRB doesn't have jurisdiction over independent contractors, much less landlord/tenant relationships and it does not enforce a tenant's right, if any, to receive a copy of the Lease Agreement.

(touching patrons). Actually, as explained below, Stevenson's testimony showed she was unable to *rebut other competent evidence* that Nolan had, in fact, terminated the Lease Agreements of other entertainer tenants for that reason. Thus, Nolan takes exception to the ALJ's failure to consider the testimony of others concerning such terminations.

Specifically, Bonzo, the club's General Manager at that time, testified that the club has monitored other entertainer tenants in the past for the same thing. However, Bonzo explained it doesn't happen a lot because "we have so many girls that don't even – once we tell them what we do at our place, they don't even think about entertaining there, because we don't touch there. We don't do dances like other places do, period. I have so many girls that they're like, 'Well, I like to grind on guys, my customers. I want to come here and entertain, and you don't do that here?' And I'm like no. Then, bye. You can go somewhere else. When guys come to our club, they know how we are." Tr, p 634. Also, when asked if there were other entertainer tenants besides Campbell whose leases were terminated for illegal touching, Bonzo answered convincingly "yes", but Stevenson would not have had a reason to know that. Tr, p 602.

But, the circumstances surrounding Campbell's wrongdoing was also different. She had been shown what was appropriate, and she had been warned. When warned, Campbell resisted the directive and told the private room monitor that he couldn't tell her what to do. Despite all this, Campbell continued to engage in illegal private room dances. Thus, Nolan had lawful reasons for preparing the April 7th letter. The ALJ erred by finding that Campbell was the only one terminated for this reason and that it mattered whether the touching was of a sexual nature (or not) since **all** touching is unlawful under Ohio law. ALJ, p 29, lines 20-

29. Clearly Campbell's defiance in continuing to perform illegal private room dances and placing Nolan's licenses at risk are lawful reasons for the April 7th letter.

Thus, Nolan takes exception to the ALJ's findings that Nolan terminated the landlord/tenant relationship and did so for an unlawful reason.

C. NOLAN DID NOT VIOLATE THE ACT.

As stated above in Exception 3, Nolan takes exception to the ALJ's finding that Nolan committed an unfair labor violation by violating Section 8(a)(4) of the NLRA (by discharging Campbell because she threatened to file and has filed charges in the past under the Act) and a derivative violation of Section 8(a)(1) (which violation may discourage employees in their exercise of their Section 7 rights) [ALJ Opinion, p 29, lines 35-43]. To do so, the ALJ had to rely on his erroneous rulings as explained in relationship to Exceptions 1 and 2 in Sections A and B above.

As explained in Section A above, Campbell was not an employee under this Board's test as set forth in *SuperShuttle*. The ALJ failed to apply the proper test and analysis when he determined that an employment relationship existed. Specifically, the ALJ erred when he: (1) failed to appreciate the significant entrepreneurship opportunity Campbell not only had via the Lease Agreement, but sought to safeguard when she raised concerns to the club; (2) applied a factor that is not part of the current independent contractor test as explained by this Board, (3) split one factor into three separate ones, thus trebling the quantitative weight he assigned; and (4) ignored, and misconstrued evidence.

As explained above, like the drivers in *SuperShuttle*, Campbell was not an employee. This is key because "the line between worker and independent contractor is jurisdictional – the Board has no authority whatsoever over independent contractors." *Fedex Home*

Delivery, 563 F.3d at 496. Thus the ALJ's decision should be reversed, and this matter dismissed by the Board since it has no jurisdiction over the claim submitted by Campbell.

Next, in order to establish the Section 8(a)(4) violation, the General Counsel had to prove an adverse action. As explained above, Campbell did everything she could to get Nolan to terminate the relationship and, when her efforts failed, she moved to another state and abandoned the Lease Agreement. Campbell, not Nolan, is responsible for the termination of the relationship. Without a discriminatory discharge by Nolan, there can be no violation of Section 8(a)(4).

To the extent that Nolan sent Campbell the April 7th letter (which Campbell never received) that "would have" terminated the relationship (had she not already abandoned the relationship), it had a lawful reason to do so. As explained above, despite being shown a lawful dance by Bonzo, being instructed to follow the law and practice it by Stevenson, and being warned again following her initial violations, Campbell continued to touch the club's patrons.

The ALJ acknowledges this, but erroneously distinguishes between touching of a sexual nature and non-sexual touching when clearly *both* violate Ohio law.

Moreover, the ALJ also ignores testimony that (1) it is unusual for entertainer tenants who want to touch patrons to even pursue a relationship with the club, and (2) the club has terminated its relationship with other entertainer tenants in the past for touching patrons. Instead, the ALJ relies on the inability of Stevenson to corroborate these facts as somehow cutting against the evidence that showed other such terminations have occurred. The ALJ's analysis is simply flawed.

Significantly, the General Counsel was required to show disparate treatment and he was unable to make this showing. Most notably, the ALJ failed to recognize that the General Counsel presented *no* evidence or testimony demonstrating that (1) another entertainer tenant was witnessed illegally touching a patron, (2) that such illegal touching was brought to the attention of management, (3) that the other entertainer tenant was warned, and in response she disputed the club's lawful right to prohibit the illegal private room performances, and (4) that other entertainer tenant continued to violate the law and the relationship was not terminated by Nolan. This is what happened with Campbell and there is no evidence that any other entertainer tenant was treated differently under the same circumstances.[12]

Had the General Counsel been able to demonstrate disparate treatment, then and only then would the burden of persuasion have shifted to Nolan "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB 1083, 1089 (1980). But because he hadn't demonstrated disparate treatment, at all, the ALJ therefore erred in shifting the burden of persuasion to Nolan to demonstrate it would still have taken such action.[13]

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[12] While Campbell claims that she witnessed another entertainer tenant touch a patron [Tr, p 827], she did not bring that claim to the attention of management, even though her Lease Agreement specifically required her to do so. Ex 2. There exists no evidence to establish that Campbell was treated differently than any other entertainer tenant.

[13] Also, any claim of animus is rebutted by the fact that Nolan took Campbell's concerns seriously, individually addressed each of her complaints, both in writing [Ex E] and at an in-person meeting with her, and also immediately scheduled meetings with the other entertainer tenants and club employees to discuss and address Campbell's concerns. Tr, pp 246-49. *Livin' Spoonful, Inc. and Portland Industrial Workers,* 361 NLRB 595, 602 (2014)("Inferring 'animus' from management meeting with employees and providing a written response "attempting to address their complaints stretches the bounds of reasonableness."); *National Dance Institute, New Mexico, Inc.*, 364 NLRB No. 35, 20 (2016)(Responding to employee complaints and

Despite the fact that the ALJ erred in shifting the burden to Nolan, the club produced sufficient evidence showing it had a lawful reason to terminate the relationship under Ohio law. Given Campbell's unlawful actions and the potential jeopardy to the club's license, the ALJ's analysis that the club would not have terminated the relationship for this reason is clear error. Without a liquor license, the club would close. Therefore, had Nolan been responsible for terminating the relationship with Campbell, which it wasn't, it clearly had a lawful and compelling reason for doing so despite Campbell's alleged protected activity.

Thus, the ALJ erred in finding that Nolan "discharged" Campbell and did so because she threatened to exercise rights (i.e., her spurious threat that she would go to the NLRB if she didn't get a copy of her lease, when tenants have no rights under the Act, much less a right to a copy of a lease under the NLRA) and because she had exercised rights in the past. Because the ALJ erred in finding a violation of Section 8(a)(4), there can be no derivate violation of Section 8(a)(1). In addition, the other entertainer tenants **objected** to Campbell's attempt to speak on their behalf as entertainer tenants. Tr, pp 518-521, 541, 555, 561-62. Thus, there was no concerted activity much less a valid concern that concerted activity rights would be "chilled" had Nolan terminated the entertainer tenant relationship, which it did not.

"attempt[ing] to address" them does not demonstrate "animus, but instead . . . is an appropriate response."); *Alex R. Thomas & Co.*, 333 NLRB 153, 164 (2001)("Expeditiously address[ing]" employee complaints does not implicate animus.).

CONCLUSION

Respondent Nolan Enterprises, Inc. submits that the above Exceptions to the Decision of the Administrative Law Judge clearly show that he erred in his findings of fact, conclusions of law, and decision to sustain the unfair labor practice charge. The Complainant was not, at any time, an employee of the Respondent Under this Board's new test as set forth in *SuperShuttle*, and not privy to the protections of the NLRA. For this reason, and those more thoroughly explained above, the Respondent has not engaged in any conduct violating the Act.

Respondent Nolan Enterprises, Inc. asks this honorable Board to reverse the Administrative Law Judge and dismiss the Charge brought by Brandi Campbell.

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Dated: August 21, 2019

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

NOLAN ENTERPRISES, INC. D/B/A/
CENTERFOLD CLUB,

Respondent,

-and- Case No. 09—CA--220677

BRANDI CAMPBELL, AN INDIVIDUAL,

Charging Party,
_____/

CERTIFICATION OF SERVICE

I hereby certify that on 20th, August, 2019, a copy of the foregoing Exceptions Brief of Respondent, Nolan Enterprises, Inc., together with a copy of this Certification of Service, were served upon the following parties/attorney(s) of record by "E-Filing," electronic mail (where applicable), and/or regular U.S. mail at their stated business address(es).

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